Supreme Court, U.S.
FILED

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NO. _____

October Term, 1993

IN THE SUPREME COURT OF THE UNITED STATES

WALTER P. SOLICK,
Petitioner

versus

PARIS ACCESSORIES, INC.,
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ON PETITIONER'S AGE DISCRIMINATION CLAIM UNDER ADEA, 29 U.S.C. §621, et seq. FOR ADMINISTRATIVE CLAIM WHERE 1) PETITIONER "IN SOME EXTRAORDINARY WAY" WAS PREVENTED FROM FILING TIMELY AN E.E.O.C. CHARGE OF EMPLOYMENT DISCRIMINATION IN THAT THE SUPREME COURT OF PENNSYLVANIA DISBARRED PETITIONER'S ATTORNEY AND ORDERED PETITIONER'S ATTORNEY TO RETURN ALL CLIENTS FILES, PETITIONER'S ATTORNEY INTENTIONALLY FAILED TO FILE PETITIONER'S E.E.O.C. COMPLAINT AND REFUSED TO RETURN PETITIONER'S FILE ON

FUNDS AS COURT ORDERED UNTIL AFTER THE ADMINISTRATIVE AGENCIES FILING DEADLINE, AND 2) RESPONDENT FAILED TO POST NOTICE OF EMPLOYEES' RIGHTS UNDER ADEA AS REQUIRED?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Walter P. Solick, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered December 17, 1993 is unrecorded and appears at page 1a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania dated May 21, 1993 is unrecorded and appears at page 13a of the Appendix herein.

JURISDICTION

The final Order of the United States Court of Appeals for the Third Circuit is dated December 17, 1993 and this Petition for Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

29 U.S.C. §621 and §627 at Appendix page 19a through 20a.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner filed this action seeking damages arising out of Respondent's termination of Petitioner's employment based upon age.

In response, Respondent filed a motion to dismiss for failure to file timely an administrative claim. The district court denied Respondent's motion, finding that Petitioner's claim was timely according to the allegations of Petitioner's Complaint. Next, Respondent moved for summary judgment claiming that the statute of limitations ought not be equitably tolled. The district court entered summary judgment for Respondent. The United State Court of Appeals for the Third Circuit upheld the district court decision. Petitioner respectfully seeks review by this Honorable Court.

B. RELEVANT FACTS

Petitioner filed a Charge of Employment Discrimination with the Equal Employment Opportunity

Commission (E.E.O.C.) nineteen (19) days after filing deadline based upon the following extraordinary circumstances. Respondent failed to post the notice (required under ADEA), informing employees, including Petitioner, of their rights under ADEA. Respondent alleged that Respondent posted notice. However, although Petitioner regularly looked at the bulletin board, Petitioner never saw the notice due to the cluttered condition of the boards.

Furthermore, on or about May 20, 1991, Petitioner contacted an attorney, Aaron Matte, to inquire about Petitioner's legal rights concerning Respondent's unlawful termination of Petitioner's employment. Attorney Aaron Matte counseled Petitioner that Petitioner had valid reasons to file a Charge of Discrimination with the E.E.O.C. Petitioner paid Attorney Matte a retainer fee of $2,500.00 to protect Petitioner's legal rights in this unlawful termination case. Most of the retainer was returned to Petitioner only after numerous requests to Aaron Matte's office and long

after Petitioner received his file from Aaron Matter.

Attorney Matte knowingly, intentionally and purposefully failed to file Petitioner's Charge of Employment Discrimination with the E.E.O.C. and intentionally, knowingly and willfully concealed that failure from Petitioner until after the 300 day E.E.O.C. deadline. Attorney Aaron Matte fraudulently represented to Petitioner that Attorney Matte had taken care of protecting Petitioner's legal rights in this matter.

On or about November 19, 1991, Petitioner learned that Attorney Matte had been disbarred by the Supreme Court of Pennsylvania. Petitioner promptly contacted Attorney Matte's office to retrieve his file in this matter. Despite numerous telephone contacts with and personal visits to Attorney Matte's office requesting return of his file, Attorney Matte refused to return Petitioner's file.

At the aforesaid times, when Petitioner would personally appear at Attorney Matte's office to retrieve his

file, Attorney Matte would inform Petitioner that the file would be ready for return the next day or that Attorney Matte had the file with him out of town or some other fabrication in a now apparent attempt to conceal the fact that Attorney Matte had not taken any action to protect Petitioner's rights as Attorney Matte had contracted to do.

Petitioner reasonably and justifiably relied upon representations of his attorney, (whom Petitioner had paid a retainer fee), that Attorney Matte had "taken care of filing a Complaint" in this matter on behalf of Petitioner. On about January 24, 1992, on one of Petitioner's failed attempts to retrieve Petitioner's file at Attorney Matte's office, Petitioner learned for the first time that Petitioner was required to file a Charge with the E.E.O.C. within 300 days of the unfair employment practice, that Attorney Matte had failed to file a Charge despite Matte's fraudulent representations to the contrary, AND that Matte had fraudulently concealed his failure to so file.

On about February 4, 1992, Petitioner, on his own, promptly filed a Charge with the E.E.O.C. without the benefit of counsel, (for which Petitioner had already paid.) Based upon the above facts, Petitioner, in an extraordinary way, had been prevented from asserting his rights with the E.E.O.C. in a timely fashion.

Petitioner respectfully seeks review by this Honorable Court of the Order affirming summary judgment because of Petitioner's untimely filing with the E.E.O.C.[1]

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[1]The facts relevant to substance of Petitioner's Age Discrimination claim have been omitted as irrelevant to the limited issue before this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate is the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ON PETITIONER'S AGE DISCRIMINATION CLAIM UNDER ADEA, 29 U.S.C. §621, et seq. FOR ADMINISTRATIVE CLAIM WHERE 1) PETITIONER "IN SOME EXTRAORDINARY WAY" WAS PREVENTED FROM FILING TIMELY AN E.E.O.C. CHARGE OF EMPLOYMENT DISCRIMINATION IN THAT THE SUPREME COURT OF PENNSYLVANIA DISBARRED PETITIONER'S ATTORNEY AND ORDERED PETITIONER'S ATTORNEY TO RETURN ALL CLIENTS FILES, PETITIONER'S ATTORNEY INTENTIONALLY FAILED TO FILE PETITIONER'S E.E.O.C. COMPLAINT AND REFUSED TO RETURN PETITIONER'S FILE ON FUNDS AS COURT ORDERED

UNTIL AFTER THE ADMINISTRATIVE AGENCIES FILING DEADLINE, AND 2) RESPONDENT FAILED TO POST NOTICE OF EMPLOYEES' RIGHTS UNDER ADEA AS REQUIRED?

1. Disputed facts preclude summary judgment. Federal Rule of Civil Procedure 56(c) states that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Small v. Seldows Stationary, 617 F.2d 922 (3d Cir, 1980). The court does not decide issues of fact, but simply determines if there is an issue of fact to be tried. Ettinger v. Johnson, 556 F.2d 692 (3d Cir, 1977). The facts must be viewed in the light most favorable to the opposing party, and any reasonable doubt as to the existence of genuine issues of fact is to be resolved against the moving parties. Continental Insurance Company v. Bodre, 682 F.2d 436 (3d Cir, 1982). Applying this standard to the case at bar, Respondent's Motion ought to have been denied.

Respondent's second motion again was limited to Petitioner's alleged failure to file timely a charge of employment discrimination with the E.E.O.C. Petitioner did protect his right to file this action based upon the extraordinary circumstances and reasons set forth below.

Generally, a Plaintiff must file a charge of age discrimination with the E.E.O.C. within 300 days from the date of the unlawful employment practice. 29 U.S.C. §626(d)(2).

2. The limitation period for filing with the E.E.O.C. may be subject to equitable tolling. Bonham v. Dresser Indus., 569 F.2d 187, 193 (3d Cir, 1977), cert denied, 429 U.S. 821 (1978), (equitable tolling appropriate under ADEA). Petitioner carries the burden of establishing that the statute has been tolled. Butz v. Hertz, 554 F.Supp. 1178, 1181 (WD, Pa, 1983), (citing Sweitlowich v. County of Bucks, 610 F.2d 1157 (3d Cir, 1979).

Petitioner respectfully submits that exceptional facts

of this case support Petitioner's contention that the statute has been tolled. In his Complaint, Petitioner pleaded the facts Petitioner believes support equitable tolling:

> 5. Although Plaintiff filed a Charge of Employment Discrimination with the Equal Employment Opportunity Commission nineteen (19) days after the 300th day from the unfair employment practice, the E.E.O.C. filing deadline is subject to equitable tolling for the following reasons.
>
> 6. At all times herein relevant, Defendant failed to post the notice (required under ADEA), informing employees, including Plaintiff, of their rights under ADEA. (OR Defendant buried the notice on cluttered bulletin boards making it impossible for Plaintiff to notice of read any notice.)
>
> 7. On or about May 20, 1991, Plaintiff contacted Aaron Matte, Esquire to inquire about Plaintiff's legal rights concerning Defendant's unlawful termination of Plaintiff's employment described herein.
>
> 8. At the time aforesaid, Attorney Aaron Matte counseled Plaintiff that Plaintiff had valid reasons to file a Complaint.
>
> 9. At the time aforesaid, Plaintiff paid Attorney Matte a retainer fee of $2,500.00 to protect Plaintiff's legal rights in this unlawful

termination case. Most of the retainer was returned to Plaintiff only after numerous requests to Aaron Matte's office and long after Plaintiff received his file from Aaron Matte.

10. Thereafter, Attorney Matte knowingly, intentionally and purposefully failed to file Plaintiff's Charge of Employment Discrimination with the E.E.O.C. and intentionally, knowingly and willfully concealed that failure from Plaintiff until after the 300 day E.E.O.C. deadline.

11. Attorney Aaron Matte fraudulently represented to Plaintiff that Attorney Matte had taken care of protecting Plaintiff's legal rights in this matter.

12. On or about November 19, 1991, Plaintiff learned that Attorney Aaron Matte had been disbarred by the Supreme Court of Pennsylvania.

13. Plaintiff promptly contacted Attorney Matte's office to retrieve Plaintiff's file in this matter.

14. Despite numerous telephone contacts with and personal visits to Attorney Matte's office requesting return of Plaintiff's file, Attorney Matte refused to return Plaintiff's file.

15. At the aforesaid times, when Plaintiff would personally appear at Attorney Matte's

office to retrieve Plaintiff's file, Attorney Matte and/or his agents, servants and employees would inform Plaintiff that the file would be ready for return the next day or that Attorney Matte had not taken any action to protect Plaintiff's rights as Matte had contracted to do.

16. At all times herein relevant, Plaintiff reasonably and justifiably relied upon representations of his attorney when Plaintiff had paid a retainer fee, that Attorney Matte had "taken care of filing a Complaint" in this matter on behalf of Plaintiff.

17. On about January 24, 1992, on one of Plaintiff's failed attempts to retrieve Plaintiff's file at Attorney Matte's office, Plaintiff learned for the first time that Plaintiff was required to file a Charge with the E.E.O.C. within 300 days of the unfair employment practice, that Attorney Matte had failed to file a Charge despite Matte's fraudulent representations to the contrary, AND that Matte had fraudulently concealed his failure to so file.

18. On about February 4, 1992, Plaintiff, on his own, promptly filed a Charge with the E.E.O.C. without the benefit of counsel, (for which Plaintiff had already paid).

19. Based upon the above facts, Plaintiff, in an extraordinary way, had been prevented from asserting his rights with the E.E.O.C. in

a timely fashion.

> 20. Due to Attorney Matte's fraudulent representations and affirmative concealment thereof, Plaintiff's justifiable and detrimental reliance thereon, Plaintiff's diligence in promptly pursuing his rights on his own upon learning of the fraud, and Defendant's failure to post a notice of Plaintiff's rights under ADEA, the E.E.O.C. filing deadline is equitably tolled so that Plaintiff may pursue legal and equitable remedies against Plaintiff's ex-employer.

Upon these facts, Respondent's motion for summary judgment ought to have been denied.

3. Despite Petitioner's clear allegations, the trial court accepted Respondent mischaracterization of Petitioner's Complaint.

a. First, Respondent mischaracterized Petitioner's allegations as mere "inadvertence of Appellant's counsel." (e.g. Appellee's District Court brief, p.7), in failing to file timely.

Petitioner's allegations are otherwise. As set forth above, Petitioner clearly alleged intentional, flagrant fraud by

Petitioner's original counsel. Please see Petitioner's Complaint.

b. Respondent misconstrued Petitioner's claims in that Respondent argues that the Respondent should not be responsible for the actions, or inactions, or a former employee's attorney. Appellee's District Court Brief, p. 8.

Petitioner never sought to hold his former employer/Respondent liable for Petitioner's former attorney's actions. Instead, Petitioner seeks to hold his former employer/Respondent liable based upon unlawful age discrimination as set forth in Petitioner's Complaint. Petitioner merely believes and thus avers that ADEA time period is subject to equitable tolling in this case due to the extraordinary actions concerning Petitioner's former attorney.

c. In attempt to obtain summary judgment, Respondent relied upon the fact that Respondent did not actively mislead Petitioner as to Petitioner's rights. (e.g. Appellee's District Court Brief, p. 8-9). In fact, Respondent

did mislead Petitioner by omission in failing to post Petitioner's rights as required by ADEA. However, Petitioner did not rely upon Respondent's actions as grounds for equitable tolling. Petitioner relies upon an alternative ground, which is, that in some extraordinary way, Petitioner has been prevented from asserting his rights. Miller v. I.T.T., 755 F.2d 20 (3d Cir, 1985), (where Third Circuit set forth three (3) distinct bases for equitable tolling.)[2]

4. The Honorable United States Supreme Court has not decided whether an attorney's intentional misconduct is grounds for equitable tolling. In granting summary judgment, the District court first seemed to adopt Respondent's mischaracterization of Petitioner's equitable tolling argument. Specifically, the District Court noted that "the Supreme Court has held that a lawyer's excusable neglect in failing to file a charge with the E.E.O.C. does not

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[2]Please note that the E.E.O.C. recently determined that Plaintiff had met all jurisdictional requirements in this case.

toll the filing period for his client.", (citing Irwin v. Veterans' Administration, __ U.S. __, 111 S.Ct. 453, 458 (1990). However, the District Court then acknowledged that this Honorable Supreme Court has not decided whether or not attorney's intentional misconduct is grounds for equitable tolling. Id. In conclusion, the District Court erroneously relied upon cases involving an attorney's negligence and ignorance of law in granting summary judgment.

Petitioner respectfully submits that if now confronted with the issue of intentional, fraudulent, extraordinary attorney misconduct, this Honorable Supreme Court will allow equitable tolling. Why should Petitioner have to lose important federal rights due to an attorney's rare, intentional, fraudulent, unforeseeable behavior?

Additionally, current law provides a grounds for equitable tolling due to extraordinary circumstances in the case at bar. Please see, Shafer v. Bd. of Public Education, 903 F.2d 243, 251 (3d Cir, 1990); Dandrea v. Marlsbay

Manuf. Co., 839 F.2d 163, 168 (3d Cir, 1980); Kocian v. Getty Refining & Marketing Co., infra.

5. Petitioner's claim is subject to equitable tolling where, as here, Petition in some extraordinary way has been prevented from asserting his rights. Id.; Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 751 (3d Cir, 1983), cert denied, 464 U.S. 852 (1983), (citing School Dist. of Allentown v. Marshall, 657 F.2d 16, 20 (3d Cir, 1981), cert denied, 104 S.Ct. 164, 78 L.Ed.2d 150 (1983).

Petitioner's case does not involve mere negligence or ignorance, but flagrant, affirmative fraudulent acts by a disbarred attorney.

The undisputed facts relevant to Respondent's motion can be summarized as follows. After Respondent's alleged discriminatory acts, Petitioner promptly secured an attorney who charged a retainer. Petitioner's attorney intentionally, consistently, and fraudulently represented to Petitioner that Petitioner's attorney had filed a Charge of Employment

Discrimination with the E.E.O.C. Petitioner diligently pursued his rights especially after the Pennsylvania Supreme Court ordered Petitioner's attorney to return all court filed. Petitioner's attorney persisted in the cover-up until after the E.E.O.C. deadline passed. When the deadline passed, Petitioner, pro se, filed an E.E.O.C. Charge within about five days of obtaining knowledge of the attorney's fraud and 19 days after the 300 day requirement. Please see, Hart v. J.I. Baker Chemical Corp., 598 F.2d 829, 832 (3d Cir, 1979); Bronze Shields, supra, at 667 F.2d at 108.

This case does not involve ordinary attorney neglect. The extraordinary actions of a disbarred attorney prevented Petitioner from filing with the E.E.O.C. on time. Hence, Petitioner's Motion for Summary Judgment ought to have been denied.

6. The District Court erred in granting summary judgment where Respondent/Employer failed to post notice of Petitioner/Employee's rights as required under ADEA.

Section 627 of ADEA requires Respondent/Employer to "post and keep posted in conspicuous places upon its premises a notice...setting forth [employee rights under ADEA]." 29 U.S.C. §627.

The failure to post the required notice will toll the 300 day E.E.O.C. filing deadline. Bonham v. Dresser Industries, Inc., 569 F.2d at 193.

Originally, Respondent filed a motion to dismiss conceding for that motion that it failed to post the required notice. The District Court thus entered an Order denying the motion due to failure to post.

Thereafter, Respondent filed a motion for summary judgment with affidavits stating Respondent did post notice of employee's rights. Petitioner never saw any such notice. IF Respondent did post any notice, it was buried under clutter on the bulletin board. Petitioner's Affidavit supports Petitioner's allegations. So, even if, Respondent posted notice, the notice failed to meet the requirement that

Respondent post the notice in a conspicuous place. 29 U.S.C. §627. At very least, genuine issues of material fact exist concerning the posting. Hence, Respondent's motion ought to have been denied.

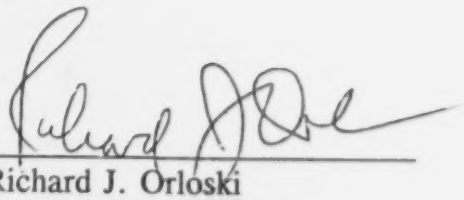
In granting summary judgment, the District Court erroneously relied upon cases where the Plaintiff did not recall seeing any notices. (e.g. Hall v. Amateck, Inc., 668 F.Supp. 417, 420 (ED, Pa, 1987); and Butz v. Hertz Co., 554 F.Supp. 1178, 1181 (WD, Pa, 1983). The case at bar is distinguishable factually and legally.

Here Petitioner looked at the bulletin boards, but, could not see any notices. If such notice were there - they were buried and thus not "conspicuous" as required. Thus, Respondent failed to comply with the letter and spirit of 29 U.S.C. §627.

Petitioner, therefore, respectfully seeks review by this Honorable Court of the Appellant decision affirming the grant of summary judgment.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari ought to be granted.



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1582

WALTER P. SOLICK,
Appellant

v.

PARIS ACCESSORIES, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Number 93-00884)
District Judge: Edward N. Cahn

Submitted Pursuant to Third Circuit LAR 34.1
December 13, 1993

Before: SLOVITER, Chief Judge,
GREENBERG, and ROTH Circuit Judges

(Filed December 17, 1993)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Chief Judge.

Plaintiff Walter Solick appeals from a grant of summary judgment in favor of his former employer, defendant Paries Accessories, Inc. The district court held that Solick's claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. (1988 & Supp. III 1991), was time barred because Solick failed to file his claim with the EEOC within the 300 day time limit applicable in a deferral state like Pennsylvania.

Subject matter jurisdiction was based on the ADEA. 29 U.S.C. §626(c) (1988). Our appellate jurisdiction is based on 28 U.S.C. §1291 (1988). Our standard of review on an appeal from a grant of summary judgment is plenary. See Metro Transp. Co. v. North Star Reinsurance Co., 912 F.2d 672, 678 (3d Cir. 1990).

I.

Paris terminated Solick's employment on March 22, 1991 when Solick was 61-years old. In May 1991, Solick

retained Aaron Matte, an attorney, to represent him in connection with his ADEA claim. When Solick learned in November 1991 that Matte had been disbarred by the Supreme Court of Pennsylvania, he unsuccessfully attempted to retrieve his file from Matte several times. Solick contends that he did not learn of the 300 day filing time limit until January 24, 1992, that Matte had misrepresented to him that a charge had been filed with the EEOC, and that he did not discover until January 1992 that a charge had not been filed.

Solick filed a claim pro se with the EEOC on February 4, 1992, 320 days after his termination, alleging discharge because of age discrimination. He then filed suit in district court on February 19, 1993, arguing that his failure to file a charge within the 300 day time limit should be excused because the time limit should have been equitably tolled. The district court rejected this contention, holding that equitable tolling was unavailable in this circumstance as a matter of law. Solick appeals.

II.

We have recognized three situations in which equitable tolling of a limitations period may be appropriate: "if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748, 753 (3d Cir. 1983), cert. denied, 464 U.S. 852 (1983).

Solick argues first that Paris "actively misled him" by not complying with the ADEA posting requirements designed to inform people of their rights. Under the ADEA, every employer must "post and keep posted in conspicuous places upon its premises a notice . . . setting forth [employee rights under ADEA]." 29 U.S.C. § 627 (1988). We have held that failure to comply with the posting requirements will toll the time limit for filing a complaint until the plaintiff either contacts an attorney or acquires actual knowledge of his

rights. See Bonham v. Dresser Indus., Inc., 569 F.2d 187, 193 (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978). In this case, however, Paris submitted two affidavits from employees attesting that, at all times relevant to this case, there were notices posted in five different locations throughout Solick's workplace on bulletin boards where employee notices were customarily posted. Solick's responsive affidavit merely stated: "[t]he bulletin boards were cluttered with many notices, and though I cannot say that the notices were not there, I never saw them on the cluttered bulletin boards."

The district court relied on our precedent that a plaintiff's bare assertion that he never saw the required notices does not create a genuine issue in that it does not contradict the defendant's proof that the posters were there. See Bonham, 569 F.2d at 193 n.7; Byers v. Follmer Trucking Co., 763 F.2d 599, 601 (3d Cir. 1985) (per curiam); see also Hall v. Ametek Inc., 668 F. Supp. 417,

420 (E.D. Pa. 1987). There is no genuine issue as to the employer's compliance with the posting requirement.

Solick also argues that the notices were not in "conspicuous places" because the bulletin boards were cluttered. There mere assertion that the bulletin boards were "cluttered" does not raise a genuine issue of fact on the material issue of whether the notices were posted in "conspicuous places." Significantly, Solick did not contest that these boards were prominent and conspicuous. He is thus left with the argument that the notices were not conspicuous vis-a-vis other material on the boards. We know of no such requirement, and Solick cites no supporting authority. An employer who has posted the requisite notices on boards that are located in "conspicuous places" where employees were likely to see them has adequately complied with the statute. See Byars, 763 F.2d at 601; Bomberger v. Consolidated Coal Co., 623 F. Supp. 89, 92 (W.D. Pa. 1985).

Solick's other basis for arguing that the time limit for filing charges with the EEOC could be equitably tolled is that he has been prevented from asserting his rights "in some extraordinary way" by the conduct of his attorney. Solick maintains that Matte intentionally and fraudulently neglected to file Solick's charge and stopped Solick from doing so by misleading Solick into believing that Matte had done so, by not informing Solick of the time limit, and by not giving Solick his file despite repeated requests. Solick maintains that he was zealously pursuing his rights at all times.

The district court noted that in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990), the Supreme Court held that an attorney's "excusable neglect" was not a proper basis for equitable tolling. Although the Supreme Court has not rules on whether an attorney's purposeful conduct is a justification for equitable tolling, the district court concluded that there was no principled reason to distinguish the two situations.

The district court also noted that federal courts have uniformly held that lawyer misconduct will not result in equitable tolling. See De Casenave v. United States, 991 F.2d 11, 13 (1st Cir. 1993) (no tolling for period during pendency of first suit when first suit dismissed because attorney did not comply with scheduling demands); Jacobson v. Pitman-Moore, Inc., 624 F. Supp. 937, 943 (D. Minn. 1985), aff'd mem., 786 F.2d 1172 (8th Cir. 1986); Taylor v. Epsy, 816 F. Supp. 1553, 1559-60 (N.D. Ga 1993); Maira v. Hooker Chem. & Plastics Corp., 26 Fair Empl. Prac. Cas. (BNA) 254, 256 (W.D.N.Y. 1981) (holding that "plaintiff's attorney's ignorance of the law and misinformation of his client" will not toll the time limit).

We conclude that the district court did not err. Our conclusion is informed by the Supreme Court's statement in Irwin that equitable tolling has been used only where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the

complainant has been induced or tricked by adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96 (emphasis added) (footnotes omitted). Solick's situation fits into neither of those categories.

This court has previously cautioned that restrictions on equitable tolling must be "scrupulously observed." School Dist. of Allentown v. Marshall, 657 F.2d 16, 19 (3d Cir, 1981). We believe that the situation where an attorney has intentionally failed to file a claim and has impeded his client from filing a claim is not materially distinguishable from that of the negligence attorney in Irwin, and thus will not support application of equitable tolling here.

This is not a situation analogous to that where a government agency erred or misled the plaintiff, which justified equitable tolling in Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided court, 454 U.S. 99 (1977). The statement of the Supreme Court in Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962) (quoting

Smith v. Ayer, 101 U.S. 320, 326 (1880)), upholding a dismissal for an attorney's failure to prosecute, is apt here:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

We appreciate the justifiable frustration of a plaintiff who has relied on counsel and who belatedly learns that the reliance was misplaced. Even the possibility of a malpractice suit, see Taylor, 816 F. Supp. at 1560, may not be a totally satisfactory remedy. On the other hand, that is not an adequate basis to impose the effect of the attorney's alleged fraudulent actions on the employer, who bore no responsibility for the selection of the attorney or plaintiff's failure to act with more dispatch.[1]

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[1]Because the district court made no finding as to whether Solick pursued his claim diligently, we will not consider

Equitable tolling is generally deemed inappropriate for plaintiffs who are represented and are thereby deemed to have constructive knowledge of the deadlines, see Kocian, 707 F.2d at 755; Meyer v. Riegel Prods. Corp., 720 F.2d 303, 308-09 (3d Cir. 1983), cert. dismissed, 465 U.S. 1091 (1984); Downie v. Electric Boat Div., 504 F. Supp. 1082, 1086 (D. Conn. 1980).

III.

The district court did not err in holding that there was

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whether Solick was reasonably prudent in failing to call the EEOC and ask about his case until late january, even though he knew in November that Matte had been disbarred.

no genuine issue of material fact as to whether the ADEA's filing time limits should be tolled in Solick's case. Therefore, we will affirm the grant of summary judgment to Paris.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER P. SOLICK	:	Civil Action
v.	:	
PARIS ACCESSORIES, INC.	:	No. 93-0884

ORDER

CAHN, C.J.

May 21, 1993

AND NOW, this 21st day of May, 1993, upon consideration of defendant's Motion for Summary Judgment,

IT IS ORDERED that the Motion is GRANTED.[1] Judgment

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[1]Walter P. Solick ("plaintiff") alleges that Paries Accessories, Inc. ("defendant") violated the Age Discrimination in Employment Act ("ADEA") when it terminated his employment. See 29 U.S.C. § 623(a)(1). Defendant has moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). Rule 56(c) provides that summary judgment is appropriate if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." When considering a motion for summary judgment, the court must draw all justifiable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). If the record thus construed could not lead the trier of fact to find for the non-moving party, then there is no genuine issue for trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp.,

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475 U.S. 574, 587 (1986).

Defendant argues that plaintiff's right to sue expired upon his failure to file a timely charge with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff concedes that he did not file within the prescribed time limit. See Paragraph 5 of Complaint. Plaintiff contends, however, that the filing period should be equitably tolled for two reasons. First, plaintiff alleges that defendant failed to post notice of employee rights under ADEA. Second, plaintiff alleges that the willful misconduct of his first attorney prevented him from exercising his right to sue. Both sides have submitted affidavits in support of their respective positions.

In a "deferral state" such as Pennsylvania, an ADEA charge must be filed with the EEOC within 300 days of the alleged wrongful termination. Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1414-15 (3d Cir.), cert. denied, 112 S. Ct. 379 (1991). Filing a timely charge is not a jurisdictional prerequisite to an ADEA suit in federal court. Zipes v. TWA, 455 u.s. 385, 393 (1982); Hower v. Richardson-Vicks, Inc., 1990 U.D. Dist. LEXIS 15982 at *16 (E.D. Pa. November 27, 1990); Hall v. Amatek, Inc., 668 F. Supp. 417, 419 (E.D. Pa. 1987). Instead, the 300 day rule operates much like a statute of limitations, and thus it is subject to equitable tolling. Zipes, 455 U.S. at 393; Schafer v. Board of Public Education, 903 F.2d 243, 251 (3d Cir. 1990); Bonham v. Dresser Industries, Inc., 569 F.2d 187, 193 (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978).

The Third Circuit Court of Appeals has held that equitable tolling is appropriate if (1) the defendant has

actively misled the plaintiff; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has asserted his rights in the wrong forum. Schafer, 903 F.2d at 251; Dandrea v. Marlsbary Manufacturing Co., 839 F.2d 163, 168 (3d Cir. 1988); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 753 (3d Cir.), cert. denied, 464 U.S. 852 (1983). Plaintiff relies upon the first and second prongs of the Schafer test.

Section 627 requires that "[e]very employer . . . post and keep posted in conspicuous places upon its premises a notice . . . setting forth [employee rights under ADEA]." 29 U.S.C. §627. Plaintiff alleges that defendant misled him by failing to post such notice. In Bonham, the Third Circuit Court of Appeals held that "[f]ailure to post the required notice will toll the running of the [300] day period, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge . . . ." 569 F.2d at 193. The defendant, however, has submitted uncontradicted affidavits of two employees who swear that the requisite notice was posted at five different locations. See Exhibits A and B. Plaintiff's affidavit states only that "[t]he bulletin boards were cluttered with many notices, and through I cannot say that the notices were not there, I never saw them . . . ." Exhibit A, paragraph 23. This does not create a triable issue of fact. This court has held, under similar circumstances, that "[t]he assertion that plaintiff was aware of the bulletin boards but does not recall seeing any notices is inadequate to raise a genuine issue of fact for trial." Amatek, 668 F. Supp. at 420. See also, Butz v. Hertz Co., 554 F. Supp. 1178, 1181 (W.D. Pa. 1983); Downie v. Electric Board Division, 504 F. Supp. 1082, 1086 (D. Conn. 1980). Therefore, the court concludes that defendant did not mislead

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the plaintiff.

The complaint chronicles a series of egregious acts and omissions by plaintiff's former attorney. It is alleged, and defendant does not deny, that his lawyer deliberately failed to file a charge and concealed this omission from plaintiff. It is also alleged, and defendant does not deny, that his lawyer failed to return the client file to plaintiff in prompt fashion. The lawyer in question has been disbarred by the Pennsylvania Supreme Court. Plaintiff argues that these events constitute "extraordinary circumstances" sufficient to toll the filing period.

The Supreme Court has held that a lawyer's excusable neglect in failing to file a charge with the EEOC does not toll the filing period for his client. Irwin v. Veterans' Administration, __ U.S. __, 111 S. Ct. 453, 458 (1990). The Court has not decided whether intentional misconduct by an attorney would be grounds for equitable tolling. The lower courts, however, have held consistently that attorney misconduct does not toll the statute of limitations. In Taylor v. Espy, 1993 U.S. Dist. LEXIS 3822 (N.D. Ga. March 22, 1993), the court refused to toll the filing period after plaintiff's former attorney failed to file within 90 days of an adverse decision by EEOC. Id. at *20. The court concluded that "plaintiff's proper remedy is to pursue proper action against her former attorney in state court." Id.; See also Jacobson v. Pitman-Moore, Inc., 624 F. Supp. 937, 943 (D. Minn. 1985), aff'd mem, 786 F.2d 1172 (8th Cir. 1986) ("[p]laintiff's recourse may well be a legal malpractice action against [his attorney].") In Maira v. Hooker Chemical & Plastics Corp., 26 Fair Empl. Prac. Cas. 254 (W.D.N.Y. June 19, 1981), the court held that "plaintiff's attorney's

is entered in favor of the defendant and against the plaintiff. The clerk is directed to close the docket for statistical purposes.

BY THE COURT:

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ignorance of the law and misinformation of his client" did not toll the statute of limitations. The court noted that plaintiff must bear the consequences of his attorney's behavior. Id. Plaintiff has not identified any caselaw, nor has the court found any, suggesting that a different rule applies to intentional or fraudulent acts. Therefore, this court holds, as a matter of law, that the alleged misconduct of plaintiff's former attorney is not a basis for equitable tolling.

The weight of authority supports the court's determination that equitable tolling is inappropriate under the facts of this case. The Third Circuit Court of Appeals has held, as a general matter, that "restrictions on equitable tolling must be scrupulously observed." City of Allentown v. Marshall, 657 F.2d 16, 19 (3d Cir. 1981). The court has warned that "[t]he tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious case." Id. at 20. Having found no factual or legal basis upon which to toll the 300 day filing period, the court must grant the defendant's motion.

/s/ Edward N. Cahn
Edward N. Cahn, C.J.

ENTERED 5-25-93

CLERK OF COURTS

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

Supreme Court, U.S.
FILED
MAR 29 1994
OFFICE OF THE CLERK

(2)

No. 93-1402

In The

Supreme Court of the United States

October Term, 1993

WALTER P. SOLICK,

Petitioner,

v.

PARIS ACCESSORIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARTIN J. SOBOL*
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4 pp

QUESTIONS PRESENTED

I. Whether a discharged employee failed to meet the burden of demonstrating that equitable tolling of the statute of limitations was warranted where his subsequently disbarred attorney failed to file a timely charge of discrimination?

II. Whether unrebutted evidence demonstrated that notices required by the Age Discrimination in Employment Act were properly posted in the workplace?

LIST OF PARTIES TO THE PROCEEDING

Petitioner Walter P. Solick ("Solick") is an individual resident of the Commonwealth of Pennsylvania.

Respondent Paris Accessories, Inc. is a corporation with no parent companies and no subsidiaries.

REASONS FOR DENYING THE WRIT

Respondent Paris Accessories, Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's memorandum opinion which is not published.

Solick asserts that certiorari is appropriate because a federal court of appeals purportedly has rendered a decision in conflict with the decision of another federal court of appeals. Solick has not identified *any* decision which conflicts with the Third Circuit's decision. The Third Circuit and the district court thoroughly considered the applicable precedent and applied settled law governing equitable tolling to undisputed facts.

CONCLUSION

Because there is no reason for the Court to grant certiorari in this case, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARTIN J. SOBOL*
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Attorneys for Respondent, Paris Accessories, Inc.

*Counsel of Record

March 1994

MAR 29 1994

No. 93-1402

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WALTER P. SOLICK,

v. *Petitioner,*

PARIS ACCESSORIES, INC.,

Respondent.

RESPONDENT PARIS ACCESSORIES, INC.'S MOTION FOR DAMAGES

Respondent Paris Accessories, Inc., through its counsel, respectfully moves the Court for damages in the above-entitled case pursuant to Rule 42.2 of the Rules of the Supreme Court of the United States because Petitioner Walter P. Solick's petition for writ of certiorari is frivolous.

1. On March 8, 1994, Petitioner Walter P. Solick ("Solick") filed a petition for writ of certiorari ("Petition") in the Supreme Court of the United States. Solick seeks review of the determination by the United States Court of Appeals for the Third Circuit, which is not published, affirming an award of summary judgment to Respondent Paris Accessories, Inc.

2. The only reason relied upon by Solick for allowance of a writ of certiorari is "that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an

exercise of this Honorable Court's power of supervision." Petition, p. 8. Solick has not identified any case in conflict nor has Solick identified any case in the entire petition which is issued by another court of appeals other than the Third Circuit.[1] Accordingly, the sole ground advanced by Solick for the grant of summary judgment is frivolous and is unsupported by any law or argument.

3. Solick also has misrepresented the record in this case. In his petition, Solick asserts that his complaint stated:

> 6. At all times herein relevant, Defendant failed to post the notice (required under ADEA), informing employees, including Plaintiff, of their rights under ADEA. (OR Defendant buried the notice on cluttered bulletin boards making it impossible for Plaintiff to notice of [sic] read any notice.)

Petition, p. 12. The phrase "(OR Defendant buried the notice on cluttered bulletin boards making it impossible for Plaintiff to notice of [sic] read any notice" was not contained in Solick's complaint and was added to the petition for writ of certiorari. Inclusion of this purported "quotation" from the complaint misrepresents the facts.

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[1] Solick cites to Miller v. Intern. Tel. & Tel. Corp., 755 F.2d 20 (2d Cir. 1985). Solick incorrectly cites the Miller case as a Third Circuit case. Petition, pp. v, 17. Solick incorrectly cited this case in his submission to the United States Court of Appeals for the Third Circuit and this error was identified by Paris in its brief, yet Solick continues to cite this case incorrectly. In any event, Solick does not argue in any way that Miller is inconsistent with the Third Circuit's determination. Indeed, in Miller, the Second Circuit affirmed the grant of summary judgment to an employer because the charge filed with the Equal Employment Opportunity Commission was untimely.

4. Petitioner's petition for writ of certiorari is replete with errors and incorrect citations. Some examples are:

PAGE	LINE	TEXT	CORRECTED TEXT
v	3	429 U.S. 821	439 U.S. 821
v	4	554 F.Supp 1187	554 F.Supp 1178
v	8	Marlsbay	Malsbary
v	9	(3d Cir, 1980)	(3d Cir. 1988)
v	12	Amateck	Ametek
v	21	(3d Cir, 1985)	(2d Cir. 1985)
vi	4	Shafer	Schafer
6a	16	Byars	Byers
7a	2	could	should
7a	15	rules	ruled
9a	11	negligence	negligent
13a	4	Paries	Paris

5. With the exception of changing the word "Appellant" to "Petitioner," Solick has copied the brief for appellant which was submitted to the United States Court of Appeals for the Third Circuit, virtually word for word, and submitted this brief to this Court as his petition for writ of certiorari. The fact that the brief was copied is readily apparent from the text of the petition. For example, Solick makes reference and refers this Court to "Appellee's District Court brief," and to "Petitioner's Complaint," which are not part of the record before this Court. Petition, pp. 15-16. Then, Solick merely adds the following at the conclusion of his Petition: "Petitioner, therefore, respectfully seeks review by this Honorable Court of the

Appellant [sic] decision affirming the grant of summary judgment."

6. Rule 42.2 of the Rules of the Supreme Court permits the award of damages when a petition for a writ of certiorari is frivolous. Damages may be awarded against the petitioner or against the party's attorney or against both. While the Court rarely has imposed this kind of sanction, it has invoked this rule where appropriate. Roe v. Kansas, 278 U.S. 191, 193 (1929) ($200.00 penalty for filing "frivolous" writ of error); Mississippi Central R. Co. v. Smith, 299 U.S. 518 (1936) ($500.00 damages assessed against appellant whose appeal was dismissed for want of jurisdiction); Bohn v. Bohn, 316 U.S. 646, 647 (1942) (damages awarded because appeal was frivolous); Tatum v. Regents of the University of Nebraska-Lincoln, 462 U.S. 1117 (1983) (damages awarded where a petition for certiorari was denied).

7. Petitioner has grossly abused the opportunity to seek review from this Court. Solick's counsel has submitted a petition for writ of certiorari which is wholly meritless. Solick has not advanced any reason why the petition should be granted by the Court and submitted a petition which is replete with errors, misrepresentations, and inappropriate references.

8. Petitioner has incurred counsel fees and printing costs in excess of One Thousand Dollars ($1,000.00) in responding to this wholly frivolous petition for writ of certiorari.

WHEREFORE, Respondent Paris Accessories, Inc. prays that this Court impose damages against Walter P. Solick, or against Solick's attorney, or against both, in the amount of One Thousand Dollars ($1,000.00).

Respectfully submitted,

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Dated: March 29, 1994